ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF INDIANA.[1]
SUPREME COURT OF KANSAS.[2]
SUPREME COURT OF MAINE.[3]
SUPREME COURT OF MICHIGAN.[4]
SUPREME COURT OF NEW YORK.[5]

AGENT.

In every case where a party who has engaged to perform certain labor or services employs others to perform on his account, and such others after commencing to perform, refuse to go on or to allow the work to proceed, such refusal is the refusal of their employers; and if it amounts to a violation of the contract, it is the breach of their employer. Their misconduct in such a case is his misconduct, so far as it operates upon the contract and occasions non-performance: *Keeney* v. *The Grand Trunk Railway Co.*, 59 Barb.

AGREEMENT.

Construction of.—Where the object of a contract is to relieve a party undertaking to perform a duty from some of the obligations and liabilities which the law imposes upon him in the absence of any express stipulation, it is to be construed in reference to that object and purpose: *Keeney* v. *The Grand Trunk Railway Co.*, 59 Barb.

General expressions, exempting a party from liability on account of injuries to property committed to his charge, should never be held to apply to injuries arising from the wrongful acts of the party undertaking, unless it is expressly so stipulated: *Id.*

BILLS AND NOTES.

Suit by Assignee—Representations of Maker.—The maker of a promissory note, not governed by the law merchant, made and delivered to the payee, to enable him to negotiate the note, a separate writing, of even date with the note, as follows:

"Bearcreek Tp., Ind., July 28th 1865.

"This is to show that the note given by me this day to" A. B. "for $75 is all right and will be paid when it comes due."

(Signed) C. D.

The note was assigned before maturity to one who was induced to purchase it by reason of said writing, which accompanied it. *Held*, in a suit on the note by said assignee against the maker, that the latter might impeach the note for want of consideration and fraud in obtaining it: *Jaqua* v. *Montgomery*, 33 Ind.

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[1] From James B. Black, Esq., Reporter; to appear in 33 Ind. Rep.

[2] From W. C. Webb, Esq., Reporter; to appear in 6 or 7 Kansas Rep.

[3] From W. W. Virgin, Esq., Reporter; to appear in 58 Maine Rep.

[4] From H. K. Clarke, Esq., Reporter; to appear in 20 Mich. Rep.

[5] From Hon. O. L. Barbour, Reporter; to appear in vol. 59 of his Reports.

The assignee of a promissory note, not governed by the law merchant, to whom it was assigned before maturity, after it became due agreed to extend the time of payment for a definite period, and did so, upon the promise of the maker that, if the assignor would so forbear, he would pay it at the expiration of such period. *Held*, that this promise of the maker constituted a new contract, binding in law, and capable of enforcement, though the maker had a good defence to the note before its assignment by the payee: *Id.*

Carriers.

Liability for Breach of Contract—The defendant, a common carrier, received from the plaintiffs, at Goderich, in Canada, a number of cattle upon its cars, under a special contract, by which it undertook to forward them to Buffalo, to the consignee, "subject to their tariff and conditions expressed." In these conditions it was expressed that the owners undertook all risk of loss, injury, damage or other contingencies, in loading, unloading, conveyance and otherwise; and that the defendant did not undertake to forward the animals by any particular train, or at any specified hour, and was not responsible for the delivery thereof within any certain time, or for any particular market. The cattle were started the same day, and taken a part of the distance, and had the cars containing them gone on, with the train, would have reached Buffalo the same night. Instead of this, the cars, when within sixty or seventy miles of that place, were by a positive and peremptory order from the defendant's freight superintendent, detached from the train and placed upon a side track where the cattle could neither be fed nor watered, nor with any safety be unloaded, and were there detained three or four days, and several of the animals perished from hunger and the inclemency of the weather, and others were greatly reduced in flesh, weakened, and otherwise injured. *Held*, 1. That according to the conditions expressed in the special contract, the defendant could not, in this manner, and for this length of time, suspend the performance of the undertaking it had thus commenced, without rendering itself liable to the plaintiffs for the damages occasioned by such suspension. 2. That the "conditions" did not extend to a case of damage arising from the deliberate and intentional act of the defendant, or its agents, in suspending performance after it had been commenced, and refusing to perform, or to allow performance, until after the property, or a portion thereof, had been destroyed. In other words, that the defendant did not reserve to itself the right to perform, or not, as it might afterwards elect, or to perform only as it might suit its interests, convenience, or pleasure. 3. That this was not a case of an injury arising from *negligence*, in any degree, but a case of an injury arising from a deliberate and intentional refusal to perform, for the time being, the undertaking of the defendant. 4. That such refusal by the defendant's freight agent, to perform the contract, was the act of the defendant, and the defendant was liable for the consequences, so far as his act or order had the effect to prevent performance, and thus create a breach of contract, and this whether the agent was authorized to make the order or not: *Keeney* v. *The Grand Trunk Railway Co.*, 59 Barb.

A general carrier of freight has no right to discriminate, in forward-

ing freight, between different owners, in favor of one class, to the prejudice of others, by deliberately stopping, or delaying, the property of one person, in order to give a preference to that of another, contrary to the ordinary course of business: *Id.*

Constitutional Law.

Title of Legislative Acts.—A law which provides for the expenditure of certain highway taxes on two distinct state roads, and for the location and construction of a third state road, and for the expenditure of certain other taxes upon that (No. 471, Laws of 1867, p. 964), is repugnant to Art. 4, § 20 of the Constitution, that "no law shall embrace more than one object, which shall be expressed in its title:" *People ex rel. Estes* v. *Denahy*, 20 Mich.

Contract.

Construction of—Assignment—Effect of—A railroad sub-contractor, by his written agreement with the contractor, agreed "to construct and complete all the grading, earth, rock, and masonry for the road-bed of the Somerset Railroad, from the third station north of Otis Hill road-crossing, to the Kennebec river;" "that if any work shall be done by said sub-contractor which is not included in this contract, the price and value of said work shall be determined by the chief engineer;" "that the said work, during its progress, shall be subject to the supervision and inspection of said engineer, and shall be made to conform, in every respect, to his satisfaction;" "that with a view of preventing all disputes and misunderstandings, and for the speedy adjustment of such as may occur, the chief engineer shall determine the amount or quantity of the several kinds of work herein contracted to be done, and shall decide every question which can or may arise relating to the execution of work under this contract, on the part of the sub-contractor, and his decision shall be final." The sub-contractor did work on the foundation of the bridge across the Kennebec river, which was accepted and its value estimated by the chief engineer. *Held*, that the work on the bridge foundation was done under the contract: *Rogers* v. *Hogan*, 58 Me.

And an assignment of such a contract by the sub-contractor, and "all the rights and privileges therein mentioned," except the 10 per cent. due "on all earth, excavations of earth, and masonry and stone delivered on the road to the 1st of March," carries the value of the work on the foundation of the bridge as estimated by the chief engineer: *Id.*

Illegal Contract—Recovering back Money paid under.—If the parties to an illegal contract are not in *pari delicto*, the party which has been taken advantage of by the one receiving the money, may recover it back in an action for money had and received: *Inhabitants of Concord* v. *Delaney*, 58 Me.

The plaintiff town, at a legal meeting called for the purpose, "voted to raise six hundred and twenty-five dollars to each man who enlists to fill Concord's quota on the last call," and that "the selectmen hire money and pay the volunteers after they are mustered into the United States service." Thereupon the selectmen hired the money and paid fifty-four hundred dollars to the defendants, who fraudulently assured

them that pursuant to their contract with the selectmen, the defendants had caused to be enlisted, accepted, and placed to the quota of the plaintiff town nine men for three years each, when in fact eight of the men were enlisted and credited for one year only. In an action for money had and received to recover back the money paid, *Held*, that the action is maintainable, without first placing the defendants in *statu quo*: *Id.*

Damages.

Measure of—Conversion.—Where one forcibly took possession of certain wheat as it stood in the field, driving the owner away, and harvested and sold it: *Held*, in an action for such taking and conversion, that the value of the wheat at the time of its sale, in the form in which it was sold, was the measure of damages, if the plaintiff was content therewith, though he was entitled to the highest price of the property at any time between the taking and the sale; and the defendant was not entitled to prove the value of his own labor in harvesting and threshing the crop, for the purpose of reducing the damages: *Ellis* v. *Wire*, 33 Ind.

Deed.

Reforming Deeds in Equity—Parol Evidence to establish Trusts.—Deeds of conveyance, leases, or other written evidences of title, will not be changed by proof of a verbal agreement, except in very clear cases, and where the contract is proved to the entire satisfaction of the court: *Case* v. *Peters*, 20 Mich.

Frauds, Statute of.

Interest in Land.—The right to use, for the purpose of worship, a church edifice when not occupied by the church to which it belongs, is an interest in real estate, and a contract therefor, to be valid, must be in writing, signed by the party to be charged: *Brumfield* v. *Carson*, 33 Ind.

Highway.

Neighborhood Road.—A neighborhood road is not a private road, and the question whether the right of eminent domain may be exercised to take land for a private road is not applicable to it: *Kissinger* v. *Hanselman*, 33 Ind.

The record of the board of county commissioners in a proceeding to locate a highway need not contain the evidence by which it was proved that the proper notice had been given of the intention to present the petition for the highway;—it is enough if the record shows that the fact was proved, without showing how it was proved: *Id.*

Homestead.

Specific Performance—Contract to convey a Homestead.—A deed by a husband, not signed by his wife, of premises occupied by them as a homestead, is not merely voidable, having a contingent operation as to the homestead; it is wholly invalid. And a contract by the husband to make such a conveyance, intended to have a direct and present operation, will not be specifically enforced: *Phillips* v. *Stauch*, 20 Mich.

Compensation in lieu of Specific Performance.—In a case where the value of the property, which includes a homestead, and which the husband contracted to convey, exceeds the maximum allowed as a homestead, and the premises are also subject to the contingent dower of the wife; the adjustment of compensation, together with a decree for a partial performance, would be so difficult, that it ought not to be attempted: *Id.*

INSURANCE.

Mutual Company—Receiver—Pleading.—In a suit by a receiver of a mutual fire insurance company, organized under the laws of this state, to recover an assessment on a premium note executed to said company by the defendant, it is not necessary that the complaint should be accompanied by a transcript of the decree appointing the plaintiff receiver of the company and making the assessment sued for: *Boland* v. *Whitman*, 33 Ind.

By agreement between a mutual fire insurance company, acting through its board of directors or an agent duly authorized by them, and the insured, a contract of insurance may be rescinded by the surrender of the policy before the expiration of the time for which it was issued and the release of the insured from further obligation on his premium note: *Id.*

The fact that assessments upon a premium note executed to a mutual fire insurance company have been made more frequently and in greater amounts than the agent of the company, at the time of the execution of the note, represented they would be to the insured, who confided in such representations and was induced thereby to enter into the contract and execute the note, cannot constitute a defence to a suit on such note: *Id.*

Fraudulent Representations as to Solvency.—If at the time of the making of the contract of insurance, the agent, by the authority of the directors, represents that the company is entirely solvent and able to pay all losses and is then worth a certain considerable amount, and the insured relies on such representations and is induced thereby to enter into said contract and execute the premium note, and said representations are false, these facts will constitute a good defence to a suit on said premium note: *Id.*

Pleading—Fraud.—Suit by the receiver of a mutual fire insurance company on a premium note. Answer, that the officers of said company entered into a fraudulent combination with A. and B. and procured the institution by A. and B. of the suit against said company, in which said receiver was appointed and the assessment sued for in this action was made, and by fraud, collusion, improper admissions, and false testimony, procured the decree, assessment, and appointment of the plaintiff in this action as receiver. *Held*, that if the defendant could in this collateral manner impeach said decree for fraud, still the answer was bad for failing to allege any material facts constituting fraud: *Id.*

Change of Ownership of Insured Property.—Where property insured by a mutual fire insurance company is sold and conveyed by the insured, he is not liable to be assessed on his premium note for losses occurring after such sale and conveyance: *Id.*

INTEREST. See *Trustee.*

Remedy—Act of 1867.—Where a promissory note containing a stipulation for interest at the rate of ten per cent. per annum was executed before the interest law of 1867, authorizing such contracts, was enacted, and suit was brought thereon after that law took effect, *Held*, that the contract as to interest was governed by said law: *Pattison* v. *Jenkins*, 33 Ind.

LANDLORD AND TENANT.

Lease at Lessee's Option—Election.—A party in possession of premises under a lease granted "for the term of one year, with the privilege of having the same three years at the same rate" at his option,—the lease containing a covenant that he would "at the end of said term deliver up quiet possession of the premises," and who continues in possession after the end of the first year, elects, by such continuance, to hold the premises for the full term of three years: *Delashman* v. *Berry*, 20 Mich.

PARTNERSHIP.

Individual and Partnership Debts—Mortgage.—Certain real estate being owned by a firm composed of two partners and used in the business of the partnership, one of them alone executed a mortgage on an undivided half of it, to secure the payment of his individual debt. Afterwards said real estate was sold at sheriff's sale under a judgment rendered, after the execution of said mortgage, against the partners, for a debt of the firm contracted before the execution of the mortgage. *Held*, that the mortgagee was not entitled to foreclose his mortgage as against the purchaser at the sheriff's sale, without first redeeming or offering to redeem from the sheriff's sale that part of the real estate covered by said mortgage: *Kistner* v. *Sindlinger*, 33 Ind.

Suit between Partners—Code.—Under the code, a partner can sue his copartner, not to recover the plaintiff's share of the partnership property or assets before the partnership business has been adjusted, but to obtain an adjustment of the partnership affairs and thus recover his entire interest therein. The case made must be such as would formerly have called for the interposition of a court of equity: *Page* v. *Thompson*, 33 Ind.

Three persons were the owners of equal shares of a steamboat, which they ran on joint account as partners. Suit in the usual form as upon an *assumpsit* by one of them against another to recover one-third of the amount which the latter owed the firm for liquors bought by him at the bar of the boat (the third partner being made a defendant to answer as to his interest). The partnership business had ceased, but there had been no settlement thereof, the firm being still indebted, and having uncollected claims due to it, and no balance having been agreed upon as due from one partner to the others or either of them, and no special promise having been made by the defendant to pay the plaintiff anything. *Held*, that the suit would not lie: *Id.*

PLEADING. See *Vendor and Purchaser.*

In Abatement.—A plea in abatement must be direct and positive, and not argumentative: *Severy* v. *Nye*, 58 Me.

Thus, in an action against a sheriff for the wrongful official acts of

his deputy, a plea in abatement alleging substantially that the alleged trespass accrued to the plaintiff by reason of the official acts of the defendant's deputy, for which the defendant was legally responsible; that the plaintiff had his election to bring his action therefor directly against the deputy or the defendant; that he elected to and did bring it against the deputy, and the same is still pending and undetermined; and "that by bringing his said suit directly against said deputy, the plaintiff elected to release and did thereby release this defendant from all further liability for the supposed trespasses," etc., is bad: *Id.*

The pendency of an action of trespass against a deputy-sheriff for his wrongful acts done under color of his office, cannot be pleaded in abatement in an action against the sheriff for the same cause: *Id.*

The pendency of such a suit against a deputy when an action against the sheriff for the same cause is entered, is not a release of the latter action: *Id.*

Railroad.

Negligence—Setting Fire to Grass alongside the Road.—When the facts are agreed, what constitutes negligence is a question of law, and this court can determine what is shown in the facts as readily and as fully as the District Court: *Kansas Pacific Railway Co.* v. *Butts*, 6 or 7 Kans.

When a railway company is authorized to operate its line with locomotives propelled by steam, generated by fire, and uses a locomotive provided with all the most approved applicances in use for preventing injuries, by the escape and communication of fire therefrom, in good order, and operated by competent and careful servants of the company, and owing to a high wind, fire escapes, and spreading, burns the property of another, this is not negligence on the part of the company: *Id.*

It is not negligence, *per se* to permit standing grass and weeds to remain on a railway track: *Id.*

Real Estate.

Damages—Action by Owner not in Possession.—An owner of real estate is not without a remedy for injuries done to or upon the same, simply because he is not at the time in possession of the same: *Fitzpatrick* v. *Gebhart*, 6 or 7 Kans.

Under chapter 113, of the General Statutes (page 1095), the owner of real estate may recover the damages therein provided for, whether he be in possession of the real estate or not; and he may recover, notwithstanding the party committing the injuries may be in possession of the property as tenant of the owner, provided he commits the injuries without any color of authority: *Id.*

Receipt.

Construction of—Certificate—Construction of.—A writing acknowledging that the subscriber had received the promissory note of another "for five shares of stock in the M. T. Co., and certificates of stock are to issue to" the maker of the note for the same, when ready for issue,—is not a contract for the future sale of the shares, but a recognition that the shares themselves were the consideration of the note: *Hope Iron Works* v. *Holden*, 58 Me.

A certificate that a certain person named "is the owner of five-fortieth

parts of the letters-patent and property of the M. T. Co.," . . . and stipulating "that whenever an incorporated company shall be organized . . . the holder hereof shall be entitled to receive its equivalent value in the certificate of shares in the capital stock of such company," does not operate as an assignment to the holder of any interest in the letters-patent: *Id.*

REPLEVIN.

Demand before Suit.—The rule of this Court in *Trudo* v. *Anderson*, 10 Mich. 357,—that where one's property has been disposed of without authority by the person having it in charge, the owner may bring replevin therefor without previous demand, approved: *Ballou* v. *O'Brien*, 20 Mich.

SALE.

Misrepresentation as to Quantity.—A. exhibited to B. a Schedule, as a representation of the quantity of certain personal property, which the former proposed to sell to the latter, who before purchasing, visited the place where the property was situated, for the purpose of examining the property and satisfying himself concerning it, and having examined it as to quantity, or having had a full opportunity to do so, relying on his own judgment, proposed other terms than those proposed by A., by offering a sum in gross for an entire amount of property, including that named in said schedule and other articles situated at the same place, and A. accepted the offer, and the sale was made on the terms so proposed by B. *Held*, in a suit on a note given in part payment, that the maker could not set up as a failure of consideration, that the property name in said schedule was of less quantity than therein represented; and that the buyer could not claim that the seller had deceived him as to the quantity of the property named in the schedule: *Pattison* v. *Jenkins*, 33 Ind.

Where a full opportunity is afforded to a purchaser for examining property, which he is about to purchase, and which by the exercise of ordinary diligence and prudence he could examine as to its quantity, the question of the quantity being made to depend merely on the judgment, and he fails to exercise such diligence and prudence, he cannot after the sale complain that he has been deceived as to the quantity, or claim a deduction from the price on account of the quantity: *Id.*

SHERIFF. See *Pleading*.

Misconduct—Amercement after his Term of Office.—A sheriff may, after his term of office has expired, be amerced for official misconduct, whenever a proper case is made therefor: *Armstrong* v. *Grant*, 6 or 7 Kans.

A sheriff who receives a writ of execution about thirty days before his term of office expires, but does not serve the writ, nor return it to the court from which it was issued, nor deliver the same to his successor in office, cannot be amerced under the statute, unless it is affirmatively shown, by special circumstances, that he was negligent, in failing or refusing to commence to execute the writ before his term of office expired: *Id.*

Discharge of Liability.—After the liability of a sheriff had become fixed, by the neglect of his deputy to levy, collect or return an execu-

tion within its lifetime, the defendant applied to the plaintiff and obtained his written consent, to be exhibited to the deputy, stating that he would not proceed against the plaintiff until the maturity of certain notes which the defendant proposed to leave with the deputy to satisfy the execution. *Held*, that such consent did not, *per se*, operate to discharge the liability of the sheriff: *McKinley* v. *Tucker*, *Sheriff*, *&c.*, 59 Barb.

The plaintiff in the execution having expressly refused to take the notes, himself, or to do any act to impair his remedy against the sheriff it was further *held*, that his written consent to postpone proceedings against the sheriff until the maturity of the notes did not operate as a ratification of the prior neglect of the deputy which created the liability: *Id.*

Otherwise, *it seems*, if the plaintiff, after a valid levy, had consented to the arrangement, and to a postponement of the sale of the defendant's property in the meantime: *Id.*

Statute.

Operate prospectively—Title.—A law will be construed to have a prospective operation only, unless the intent of the Legislature to the contrary plainly appears. In cases of doubt the title of the act may be resorted to in aid of its interpretation: *Smith* v. *Humphrey*, 20 Mich.

Trustee.

Administrator—When Chargeable with Interest.—An administrator delayed some ten years in settling the estate, using the money of the trust in his own private speculations, and upon a reference of his accounts to a master, it did not appear that there was any reason for any unusual delay in the settlement, and the administrator refused to account to the master for the result of said speculations. The master in making his report charged interest, after the first year from the granting of administration, on balances in the hands of the administrator: *Held*, that there was no error of which the administrator could avail himself, though the master should have charged *compound* interest, making annual rests in the accounts for that purpose: *Johnson's Administrators* v. *Hedrick*, 33 Ind.

Vendor and Purchaser.

Forfeiture—Notice.—A contract for the sale and conveyance of real estate contained a stipulation, that a non-compliance with the terms of the contract, or any of them, by the vendee should work a forfeiture of all right under the contract at the option of the vendor, but upon previous notice, of a specified period, to the vendee, demanding a fulfilment and specifying such features as it should be deemed had not been complied with: *Held*, in an action by the vendee, who had partly performed the contract on his part, against the vendor for wrongfully declaring a forfeiture and thereby putting it out of the power of the vendee to further carry out the contract according to its terms, that the stipulation for said notice was for the benefit of the vendee, and a strict compliance with it by the vendor was necessary before declaring a forfeiture: *Case* v. *Wolcott*, 33 Ind.

Held, also, that where the vendor, after giving to the vendee a notice not in strict compliance with said stipulation, and while the contract

was therefore in full force, by declaring a forfeiture put it out of the power of the vendee to carry out his part of the contract, the vendee was not required to perform or offer to perform, but might have his action for being so prevented: *Id.*

Measure of Damages.—Where after part performance of a contract for the conveyance of real estate, by the vendee, the improvements made by him being contemplated by the contract, the vendor by his own wrongful act puts it out of the power of the vendee to fully comply with the provisions of the contract, the measure of damages in an action by the vendee against the vendor, for such breach, is the difference between the unpaid purchase-money and the actual value of the lands at the time of the breach: *Id.*

Fraud—Pleading.—A complaint for damages for fraudulent representations by the vendor in the sale of land must contain an averment that the plaintiff relied upon the representations. The want of such averment cannot be supplied by a recital of evidence which might justify a presumption that the representations were relied upon, unless such evidence be conclusive of the fact: *Goings* v. *White*, 33 Ind.

VESSEL.

Lien on Vessels— Writ for enforcing.—The writ for enforcing a laborer's lien on a vessel, under Public Laws of 1858, c. 15 (R. S., c. 91, § 7), need not allege whether the labor was done before or after she was launched: *McCabe, in rem*, v. *McRae and Ship Empire*, 58 Me.

The lien attaches, notwithstanding the labor was performed for one who contracted with the owner: *Id.*

If the claimant would avoid the lien, he must show that the laborer has knowingly surrendered or waived it: *Id.*

A person claiming a lien, for labor on a vessel, is required to state in his specification, the name of the owner only when he knows it: *Id.*

It is no defence, to an action for enforcing a lien on a vessel after she is launched, that the officer making the attachment took a receiptor: *Id.*

Where, in an action to enforce a lien upon a vessel, brought by a laborer against one who contracted with the owner, the defendant is defaulted, such default is not evidence against the claimant as to the amount of the lien on the vessel: *Id.*

The question, "For how much of the amount due from the defendant, the laborer has a lien on the vessel attached," is, under R. S., c. 91, § 16, at the request of either party, to be determined by a jury; and if a jury-trial be waived, this question shall be decided by the court, on a hearing or report of an auditor appointed by the court: *Id.*

WARRANTY.

Parties—Heirs.—Where a covenant against incumbrances contained in a deed of conveyance of real estate is broken, and the damages for the breach accrue during the lifetime of the person holding under such covenant, his heir has no right of action on the covenant. In such case the administrator must sue: *Frink* v. *Bellis*, 33 Ind.